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No. 06-157

In The

Supreme Court of the United States

JAY F. HEIN, DIRECTOR, WHITE HOUSE OFFICE OF FAITH-BASED AND COMMUNITY INITIATIVES, ET AL.

Petitioners,

v.

FREEDOM FROM RELIGION FOUNDATION, INC., ET AL.

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF OF THE CENTER FOR INQUIRY AND THE COUNCIL FOR SECULAR HUMANISM AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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INTERESTS OF AMICI CURIAE[1]

The Center for Inquiry ("CFI") is a nonprofit educational organization dedicated to promoting and defending reason, science, and freedom of inquiry. The Council for Secular Humanism ("CSH") is an affiliate of CFI. Through education, research, publishing, social services, and other activities, including litigation, CFI and CSH encourage evidence-based inquiry into science, pseudoscience, medicine and health, religion, and ethics. CFI and CSH believe that the separation of Church and State is vital to the maintenance of a free society that allows for a reasoned exchange of ideas about public policy. The *amici* have submitted this brief because allowing access to the courts is critical to enforcing the boundaries between Church and State that are an essential part of our free society.

SUMMARY OF ARGUMENT

In response to the Executive's requests, Congress has consistently and intentionally funded the sustained government program — the Faith-Based and Community Initiatives ("Faith-Based Initiatives") — that is at the heart of Respondents' suit. The legislative record makes clear that Congress has closely collaborated with the Executive Branch to support and fund these Faith-Based Initiatives, of which the challenged activities are an integral part. Under these circumstances, the Petitioners have not fairly characterized this suit as solely a challenge to executive action.

Every year since the inception of the program in 2001, the President has asked Congress to fund the Faith-

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[1] This brief was not authored, in whole or in part, by counsel for either party. No person or entity other than the *amici*, their members, and their counsel contributed monetarily to the preparation or submission of the brief. The parties consented to the filing of the brief and copies of their letters of consent are being lodged herewith.

Based Initiatives at issue. Moreover, in each of those years, executive branch agencies described to Congress how the agencies have used congressionally appropriated funds to support the Faith-Based Initiatives, the steps taken to further the goals of those Initiatives, and the uses to which future funding of the Initiatives will be put. Specifically advised how the money would be used, Congress appropriated to the Executive funds which were, as promised, used for the Faith-Based Initiatives. In some cases, Congress instructed the agencies exactly how much money they were to use to support the Initiatives.

The Respondents have standing to challenge the use of such congressionally appropriated funds under the Court's decisions in *Flast v. Cohen*, 392 U.S. 83 (1968) and *Bowen v. Kendrick*, 487 U.S. 589 (1988). Because the Executive has repeatedly sought approval and funding for the Faith-Based Initiatives, and because Congress has in response consistently, knowingly and deliberately authorized such funding, it is irrelevant for purposes of standing whether the funding comes from a general appropriation or a separate statutory grant. There is no meaningful distinction between this case and the Court's decisions in *Flast* and *Bowen*, as all are challenges to programs intentionally funded by Congress pursuant to Article I, Section 8 of the Constitution and implemented by discretionary decisions of the Executive Branch at the taxpayers' expense. Indeed, if the Court were to hold that there could be no taxpayer standing under the circumstances of this case, it would allow Congress and the Executive Branch to insulate the government from Establishment Clause challenges in the courts by funding constitutionally questionable activities through general appropriations rather than express statutory directive.

Petitioners' brief makes no mention of Congress's systematic review and approval of funding for the Faith-Based Initiatives. In reaching its decision below, the court of

appeals was apparently not aware of the connection between the Congress and the expenditures supporting the Faith-Based Initiatives. Pet. App. 10a-11a. In light of the indisputable legislative record set forth below, the Court should affirm the court of appeals' decision and find taxpayer standing for the same reasons standing was found in *Flast* and *Kendrick*. In the alternative, the Court should dismiss the writ of certiorari as improvidently granted because the question framed in the petition — whether taxpayers have standing to challenge Executive Branch conduct financed "only *indirectly* through general appropriations" — is not presented by the record in this case.

I. THE LEGISLATIVE RECORD DEMONSTRATES CONGRESSIONAL INTENT TO FUND THE FAITH-BASED INITIATIVES

From the inception of the program, Congress was advised of the President's Faith-Based Initiatives and the needed funding. In 2001, President Bush sent a message to Congress entitled "Rallying the Armies of Compassion." H.R. Doc. No. 107-36 (2001). As part of that message to Congress, the President sent to Congress Executive Orders 13,198 and 13,199, which called for the creation of the White House Office of Faith-Based and Community Initiatives and instructed that Centers for Faith-Based and Community Initiatives ("Faith-Based Centers") be established in the Departments of Health and Human Services, Housing and Urban Development, Justice, Labor and Education. *Id.* at 4, 13. The White House subsequently issued Executive Orders establishing Centers in the Department of Agriculture and the Agency for International Development, Exec. Order No. 13,280, 3 C.F.R. at 262 (2003), the Department of Commerce, the Department of Veterans Affairs and the Small Business Administration,

Exec. Order No. 13,342, 3 C.F.R. at 180 (2005), and the Department of Homeland Security, Exec. Order No. 13,397, 71 Fed. Reg. 12,275 (Mar. 7, 2006).

From fiscal year 2002 to 2005, just five of these Centers spent an estimated $24 million on "administrative" activities.[2] The Centers spent the money, in part, to host "regional conferences and targeted workshops to continue [their] support for the work of effective faith-based and community social service programs."[3] As explained below, Congress intended that its appropriations would be used to finance the administration of the Faith-Based Initiatives, including the very type of conferences that are challenged in this lawsuit.

A. The President's Annual Budgets and Executive Agencies' Budget Documentation Describe and Seek Funding for the Agencies' Implementation of the Faith-Based Initiatives

In every year since the inception of the Faith-Based Initiatives, the United States Budget submitted to Congress by the President has made clear the overall purpose of the Faith-Based Initiatives.[4] The United States Budgets have

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[2] U.S. Government Accountability Office, GAO-06-616, *Faith-Based and Community Initiative: Improvements in Monitoring Grantees and Measuring Performance Could Enhance Accountability* 16 (2006), *available at* 2006 WL 2007191.

[3] White House Office of Faith-Based and Community Initiatives, *White House Faith-Based and Community Initiative*, *available at* http://www.whitehouse.gov/government/fbci/president-initiative.html (last visited Jan. 29, 2007).

[4] United States Government, *FY 2002 Budget* 56 (2001), *available at* http://www.gpoaccess.gov/usbudget/fy02/browse.html (last visited Jan. 29, 2007) [hereinafter "*2002 Budget*"] ("With this budget, the President commits our Nation to mobilizing the armies of compassion — charities and churches, communities and corporations, ministers and mentors — to

also included specific discussions of what the individual agencies have done to support the White House's mandate, including the type of "outreach" activities challenged by Respondents. For example, the 2005 Budget stated that the Department of Labor had "taken significant steps to improve communications and outreach to faith-based and community-based organizations," *2005 Budget* at 234, and the Department of Justice had "made considerable progress in expanding outreach efforts that provide grant announcements and updates to faith-based and community groups." *Id.* at 220. The 2005 Budget also stated that the Department of Education, in support of the President's Initiatives, "conducted extensive outreach and technical assistance. The

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transform lives."); United States Government, *FY 2003 Budget* 141 (2002), *available at* http://www.gpoaccess.gov/usbudget/fy03/browse.html (last visited Jan. 29, 2007) [hereinafter "*2003 Budget*"] ("The initiative expands the access of community and faith-based organizations on a non-discriminatory basis to existing federally funded programs."); United States Government, *FY 2004 Budget* 118 (2003), *available at* http://www.gpoaccess.gov/usbudget/fy04/browse.html (last visited Jan. 29, 2007) [hereinafter "2004 Budget"] ("The President envisions a faith-friendly environment where faith-based organizations can compete equally to provide government-sponsored services."); United States Government, *FY 2005 Budget* 145 (2004), *available at* http://www.gpoaccess.gov/usbudget/fy05/browse.html (last visited Jan. 29, 2007) [hereinafter "*2005 Budget*"] (same); United States Government, *FY 2006 Budget* 41 (2005), *available at* http://www.gpoaccess.gov/usbudget/fy06/browse.html (last visited Jan. 29, 2007) [hereinafter "*2006 Budget*"] ("One of the efforts central to the President's support for the compassionate spirit of America has been his establishment of the White House office of Faith-Based and Community Initiatives. This office is dedicated to helping faith-based and community groups participate in Government-supported social service programs . . . ."); United States Budget, *FY 2007 Budget* 115-16 (2006), *available at* http://www.gpoaccess.gov/usbudget/fy07/browse.html (last visited Jan. 29, 2007) [hereinafter "*2007 Budget*"] (discussing the Compassion Capital Fund and other programs under the Faith-Based and Community Initiatives).

staff has organized 23 workshops, distributed 45,000 pieces of literature, maintained contact with 5,000 local organizations, and established an informative website." *Id.* at 113.[5] Similar updates of the activities undertaken by the executive agencies in support of the Faith-Based Initiatives have been contained in the United States Budget each year since the Faith-Based Initiatives were created in support of the President's requests for appropriations to fund such activities.[6]

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[5] *See also 2005 Budget, supra* note 4, at 113 ("As a direct result of these activities and efforts [at the Department of Education]. . . participation by FBCOs [Faith-Based and Community Organizations] in targeted discretionary grant programs has quadrupled since 2001."); *id.* at 159 ("As part of its outreach and technical assistance efforts, HHS has awarded grants to umbrella organizations to assist small and novice grantees in navigating the grant application process . . . ."); *id.* at 188 ("Rules to help increase participation among faith-based organizations for eight major programs took effect on September 30, 2003. HUD also developed an outreach and technical assistance plan to increase the quality of grant applications from such grassroots organizations.").

[6] *See 2003 Budget, supra* note 4, at 114 ("[The Department of] Education is actively implementing the President's Faith-Based and Community Initiative. . . . Education has identified barriers to participation in its programs and has developed a strong plan for eliminating those barriers."); *id.* at 181 ("Expanding the opportunities and success of faith-based and community development organizations is a HUD strategic goal."); *2004 Budget, supra* note 4, at 100 ("Education . . . provided technical assistance and outreach to FBCOs."); *id.* at 138 ("HHS has improved outreach to FBO/CBOs by establishing 1-800 numbers, streamlining web-based access and providing single points of contact in key agencies. Training initiatives are giving small and novice grantees the tools to compete for grants."); *2006 Budget, supra* note 4, at 68 ("USDA . . . initiated pilot projects and related evaluations to encourage greater involvement by [faith-based and community-based] organizations, and enhanced outreach and technical assistance capabilities."); *id.* at 177 ("HUD expanded its outreach to community organizations, including faith-based organizations, attempting to level the playing field for its formula and competitive grants."); *id.* at 215 ("DOL

Individual agencies have also repeatedly submitted budget justifications providing detailed explanations to Congress that the agencies are seeking congressionally appropriated funds to support the Faith-Based Initiatives, including the "outreach" activities challenged in this lawsuit. For example, the budget for HHS has included a line item for its Faith-Based Center of at least $1 million every year since the Center was established.[7] The 2004 "Congressional Justifications" for the office of Housing and Urban Development ("HUD") discussed in detail the activities of its Center, noting to justify its travel expenses that "HUD's field offices frequently partner with State and local governments to conduct conferences on information related to faith-based and community organizations." U.S. Dep't of Housing and Urban Dev., *FY 2004 Congressional Justifications* B-2 (2003), *available at* http://www.hud.gov/offices/cfo/reports/04estimates/centerse.pdf (last visited Jan. 29, 2007). HUD's justifications for 2005, 2006 and 2007 contained the same explanation. In each of these justifications, the Department described the previous year's actual budget, the current year's estimate and the following year's request for administrative expenses associated with the Center. The

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has made significant progress in providing outreach and technical assistance to enhance opportunities for faith-based and community organizations (FBCOs) to compete for Federal funding."); *2007 Budget*, *supra* note 4, at 179 ("The Department [of Justice] continues to conduct outreach to FBCOs . . . ."); *id.* at 284 ("The [Small Business Administration] established a faith-based center that works with community and faith-based groups to ensure access to SBA technical assistance grants.").

[7] *2002 Budget*, *supra* note 4, app. at 470; *2003 Budget*, *supra* note 4, app. at 462; *2004 Budget*, *supra* note 4, app. at 434; *2005 Budget*, *supra* note 4, app. at 456; *2006 Budget*, *supra* note 4, app. at 463; *2007 Budget*, *supra* note 4, app. at 459.

actual and projected administrative expenses exceeded $1.8 million every year.[8]

Performance and Accountability Reports submitted annually to Congress also demonstrate that Congress was kept well-informed of the agencies' activities. The Department of Labor's 2004 Report explained that "[t]he Department is working with workforce boards nationwide to increase partnerships with faith-based and community organizations that help transition hard-to-serve individuals into employment." U.S. Dep't of Labor, *2004 Performance and Accountability Report* 33 (2004), *available at* http://www.dol.gov/_sec/media/reports/annual2004/annualreport.pdf (last visited Jan. 29, 2007). The following year, the budget requested $2 million to support the President's Faith-Based Initiatives, U.S. Dept of Labor, *FY 2005 Performance Budget Overview* 28, *available at* http://www.dol.gov/_sec/budget2005/overview-pb.pdf (last visited Jan. 29, 2007), and the Performance and Accountability Report noted that "DOL [Department of Labor] extends its outreach to FBCOs [Faith-Based and Community Organizations] well beyond the confines of direct grant programs. Forty-eight intermediaries have worked with over 300 grassroots organizations since 2001 through DOL's coordination and funding support." U.S.

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[8] U.S. Dep't of Housing and Urban Dev., *FY 2005 Congressional Justifications* B-6 (2004), *available at* http://www.hud.gov/about/budget/fy05/cjs/part3/fbcominitiative.pdf (last visited Jan. 29, 2007) ($2,667,000 requested for 2005); U.S. Dep't of Housing and Urban Dev., *FY 2006 Congressional Justifications* B-6 (2005), *available at* http://www.hud.gov/about/budget/fy06/cjs/part3/fbcominitiative.pdf (last visited Jan. 29, 2007) ($1,917,000 requested for 2006); U.S. Dep't of Housing and Urban Dev., *FY 2007 Congressional Justifications* B-6 (2006), *available at* http://www.hud.gov/offices/cfo/reports/2007/cjs/part3/fbcominitiative.pdf ($1,964,000 requested for 2007) (last visited Jan. 29, 2007).

Dep't of Labor, *FY 2005 Performance and Accountability Report* 36 (2005), *available at* http://www.dol.gov/_sec/media/reports/annual2005/ annualreport.pdf (last visited Jan. 29, 2007).

Reports submitted by other agencies revealed similar activities. For example, the Department of Justice explained in its 2004 Report that "DOJ's OJJDP [Office of Juvenile Justice and Deliquency Prevention] hosted four free regional technical assistance conferences for FBOs/CBOs [Faith-Based Organizations/Community-Based Organizations] to help them navigate the federal grant application process." U.S. Dep't of Justice, *FY 2004 Performance and Accountability Report* IV-12 (2004), *available at* http://www.usdoj.gov/ag/annualreports/pr2004/P4/p03-12.pdf (last visited Jan. 29, 2007). The following year, DOJ "hosted three free regional technical assistance conferences to help FBCOs navigate the federal grant application process. DOJ also provided such assistance at one White House conference." U.S. Dep't of Justice, *FY 2005 Performance and Accountability Report* IV-12 (2005), *available at* http://www.usdoj.gov/ag/annualreports/pr2005/P4/p03-13.pdf (last visited Jan. 29, 2007). In 2006, DOJ "hosted two free regional technical assistance conferences to help FBCOs navigate the federal grant application process. The Department also provided such assistance at nine White House conferences." U.S. Dep't of Justice, *FY 2006 Performance and Accountability Report* IV-12 (2006), *available at* http://www.usdoj.gov/ag/annualreports/pr2006/P4/p03.pdf (last visited Jan. 29, 2007).

Likewise, the Department of Agriculture explained in its 2005 Report that USDA had "coordinated outreach and technical assistance by developing [a] comprehensive strategy using 12 best practices." U.S. Dep't of Agriculture, *2005 Performance and Accountability Report* 25 (2005), *available at* http://www.ocfo.usda.gov/usdarpt/par2005/

pdf/par2005.pdf (last visited Jan. 29, 2007). Actions taken in 2006 included "[c]onducting almost 4,600 outreach and technical assistance activities throughout the country to help engage faith-based and community organizations as partners." U.S. Dep't of Agriculture, *2006 Performance and Accountability Report* 28 (2006), *available at* http://www.ocfo.usda.gov/usdarpt/pdf/par2006.pdf (last visited Jan. 29, 2007).

Budget summaries compiled by other agencies also reveal detailed descriptions of their activities in support of the Faith-Based Initiatives. For example, the Department of Education's 2005 budget briefing stated that it "[c]oordinated conferences and workshops around the country in support of the Initiative" and that it "[e]quipped regional representatives of the Department with outreach tools for community-and faith-based organizations." U.S. Dep't of Educ., *FY 2005 Budget: Summary and Background Information* 80 (2004), *available at* http://www.ed.gov/about/overview/budget/budget05/summary/05summary.pdf (last visited Jan. 29, 2007). The following year, the Department reported that it had "[m]et with State and local leaders of community- and faith-based organizations to encourage collaboration with the Department." U.S. Dep't of Educ., *FY 2006 Budget: Summary and Background Information* 87 (2005), *available at* http://www.ed.gov/about/overview/budget/budget06/summary/06summary.pdf (last visited Jan. 29, 2007). In the 2007 briefing, the Department explained that it had "[h]eld technical assistance workshops in Phoenix, Chicago, Los Angeles, New York, Atlantic City, Washington, D.C., and New Orleans with leaders of community- and faith-based organizations to encourage collaboration with the Department." U.S. Dep't of Educ., *FY 2007 Budget: Summary and Background Information* 92 (2006), *available at* http://www.ed.gov/

about/overview/budget/budget07/summary/07summary.pdf (last visited Jan. 29, 2007).[9]

The Executive's plans to use congressionally appropriated funds to support the Faith-Based Initiatives were also repeatedly explained to the House Ways and Means Committee during budget hearings. In 2001, the Secretary of Health and Human Services stated that HHS' "budget framework . . . includes $3 million to establish a Center for Faith-Based and Community Initiatives in the Department in accordance with the President's recent Executive Order."[10] Another HHS official further explained that funding was required to "provide 15 new FTE needed to support the Department's Faith-Based Center established in accordance with the President's recent Executive Order."[11] The following year, the Secretary returned to Capitol Hill to request further funding for the ongoing operation of the Faith-Based Center, explaining that his budget included "$1.6 million to continue the Department's Center for Faith-Based and Community Initiatives established under the President's Executive Order."[12]

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[9] After the President's budget is transmitted to Congress, the Secretary makes available the briefing documents cited above to provide summary and background information on the new budget. Dep't of Education, *Overview: Budget Process in the U.S. Department of Education*, *available at* http://www.ed.gov/about/overview/budget/process.html (last visited Jan. 29, 2007).

[10] *Bush Administration's Health and Welfare Priorities: Hearing Before the House Comm. on Ways and Means*, 107th Cong. 15 (2001) (statement of Tommy Thompson, Sec'y of Health and Human Services).

[11] *Bush Administration Budget Proposals: Hearing Before the Subcomm. on Human Resources of the House Comm. on Ways and Means*, 107th Cong. 12 (2001) (statement of Dennis Williams, Acting Asst. Sec'y for Mgmt. and Budget, Dep. of Health and Human Services).

[12] *President's 2003 Budget Proposals Featuring HHS Secretary Thompson: Hearing Before the House Comm. on Ways and Means*,

This record makes it abundantly clear that the President and the heads of executive agencies informed Congress every year since the inception of the Faith-Based Initiatives that the Executive Branch was seeking and using congressionally appropriated funds to finance those Initiatives, including the conferences and other "outreach" programs that are an integral part of the Initiatives.

B. Congress Not Only Provided Appropriations in Response to the Repeated Budget Requests, but in Some Cases Explicitly Directed That the Funds Be Used to Administer the Faith-Based Centers

Year after year, after receiving budgets and supporting documentation from the President and executive agencies seeking congressional funding to support the Faith-Based Initiatives, Congress passed appropriations bills providing the Executive with the requested funds.[13] Although Congress was advised how the Executive intended to use those general appropriations, it never forbade the Executive from financing the Faith-Based Initiatives or the Faith-Based Centers established in each agency. To the contrary, the legislative record shows that in some cases Congress *explicitly directed* that the money it appropriated be used to fund the Faith-Based Initiative.

107th Cong. 16 (2002) (statement of Tommy Thompson, Sec'y of Health and Human Services).

[13] *See, e.g., Departments of Labor, Health and Human Services, and Education, and Related Agencies Appropriations Act, 2006*, Pub. L. No. 109-149, 119 Stat. 2833 (2005); *Consolidated Appropriations Act, 2005*, Pub. L. No. 108-447, 118 Stat. 2809 (2004); *Consolidated Appropriations Act, 2004*, Pub. L. No. 108-199, 118 Stat. 3 (2004); *Consolidated Appropriations Resolution, 2003*, Pub. L. No. 108-7, 117 Stat. 11 (2003).

A report commissioned by members of Congress and prepared by the Government Accountability Office in 2006 recognized that some of the agencies that included information on funding for their Centers in their budget requests "received guidance from Congress . . . on the amount of resources to allocate to their [Faith-Based] centers."[14] Such guidance was explicitly set forth in the final Conference Reports accompanying some of the appropriations bills.

For example, the Conference Report accompanying the 2002 appropriations bill for the Departments of Labor, Health and Human Services, and Education and related agencies, stated that "the agreement includes $1,500,000 for the Faith Based Center [of HHS] instead of $3,000,000 as proposed by the House." H.R. Rep. No. 107-342, at 108 (2001) (Conf. Rep.). The Conference Report which accompanied the 2005 consolidated appropriations bill stated that, again with respect to HHS, "[t]he conference agreement provides $1,386,000 for the center for faith-based and community initiatives as proposed by the Senate rather than $1,400,000 as proposed by the House." H.R. Rep No. 108-792, at 1198 (2004) (Conf. Rep.).

Congress has in fact exercised a significant degree of control over the appropriated funds, at times urging the Executive to coordinate more closely with it to implement the Initiatives. For example, with respect to the 2003 appropriations bill, the Conference Report stated with respect to the Department of Agriculture:

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[14] U.S. Government Accountability Office, GAO-06-616, *Faith-Based and Community Initiative: Improvements in Monitoring Grantees and Measuring Performance Could Enhance Accountability* 21 (2006), *available at* 2006 WL 2007191.

> The conferees are seriously concerned by the growing frequency of departmental and agency initiatives for which the required prior notification to the Committees on Appropriations has not been provided. The conferees note the efficiencies which attach to the least possible statutory requirements and the benefits which accrue to the more flexible Congressional direction expressed in Committee reports. However, the continuing practice of reliance on Committee report language must be accompanied by departmental and agency compliance with Congressional directives. . . . Such notification was not provided in . . . the establishment of a Faith-Based and Community Initiatives Center.

H.R. Rep. No. 108-10, at 550 (2003) (Conf. Rep.).[15] In other words, the Congress and the Executive had an understanding: So long the Executive coordinated with Congress and used the money as Congress intended, then Congress would continue to provide the funds through the general appropriations route rather than by enacting specific statutory requirements.

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[15] Further demonstrating congressional control over funding of the Initiatives, the resulting public law explained that "[n]one of the funds provided by this Act, or provided by previous Appropriations Acts to the agencies funded by this Act . . . shall be available for obligation or expenditure through a reprogramming of funds which . . . creates new programs" or "increases funds or personnel by any means for any project or activity for which funds have been denied or restricted" "unless the Committees on Appropriations of both Houses of Congress are notified 15 days in advance of such reprogramming of funds." *Consolidated Appropriations Resolution*, Pub. L. No. 108-7, § 720(a), 117 Stat. 11, 40 (2003). Similarly, the agencies were not permitted to reprogram funds in excess of a certain amount to "augment[] existing programs, projects, or activities" without prior notification. *Id.* § 720(b).

The same 2003 Conference Report recommended an appropriation of $2,606,000 for the Center for Faith-Based and Community Initiatives in HUD and included language "directing the Department to allocate funds provided under this heading in the manner specified in the joint explanatory statement of the managers accompanying this Act unless the Committees on Appropriations are notified and approve of any changes in the operating plan or through a reprogramming." H.R. Rep. No. 108-10, at 1425 (2003) (Conf. Rep.). A similar statement was contained in the Conference Report for the 2004 appropriations, which appropriated $2,639,000 for the HUD Center. H.R. Rep No. 108-401, at 1103 (2003) (Conf. Rep.).

In sum, Congress, with full knowledge of the activities of the Faith-Based Centers, made a deliberate decision to fund them each year. In fact, contrary to the assumption of the court below, *see* Pet. App. 11a, in a number of instances Congress, through its Committee Reports, explicitly "earmarked" funds to support the Faith-Based Centers established in executive agencies.

II. CONGRESS'S DELIBERATE FUNDING OF THE FAITH-BASED INITIATIVES AND CENTERS ESTABLISHES RESPONDENTS' STANDING UNDER *FLAST* AND *KENDRICK*

A. As in *Flast* and *Kendrick*, the Required Nexus Exists Between Respondents' Taxpayer Status and Congressional Funding

Just last year, this Court reaffirmed that "'a taxpayer will have standing consistent with Article III to invoke federal judicial power when he alleges that congressional action under the taxing and spending clause is in derogation of the Establishment Clause.'" *DaimlerChrysler Corp. v. Cuno,* 126 S. Ct. 1854, 1864 (2006) (*quoting Flast*, 392 U.S.

at 105-06). The Court also has repeatedly held that a taxpayer has standing to challenge such congressional action even if it is an executive branch official who makes the ultimate determination to administer the funds in a manner alleged to be in violation of the Establishment Clause. *See Kendrick*, 487 U.S. at 619; *Flast*, 392 U.S. at 103. Thus in *Kendrick*, the Court held that "there is . . . a sufficient nexus between the taxpayer's standing as a taxpayer and the congressional exercise of taxing and spending power, notwithstanding the role the Secretary plays in administering the statute." 487 U.S. at 620. That nexus existed in *Kendrick* because Congress had authorized the Secretary to expend the money pursuant to "a program of disbursement of funds pursuant to Congress' taxing and spending powers . . . ." *Id.* at 619-20. In light of Congress's intent to fund the Faith-Based Initiatives and the Centers administering those Initiatives, the same "nexus" unquestionably exists here between the Respondents' status as taxpayers and congressional taxing and spending authority under Article I, Section 8.

There is no dispute that, as in *Flast* and *Kendrick*, the conferences and other activities challenged in this lawsuit were funded by Congress with taxpayer dollars pursuant to Article I, Section 8. Unable to refute that fact, Petitioners argue that the lawsuit at issue must be deemed a challenge to executive action, rather than legislative action, because Congress had no responsibility for the decisions of the Executive Branch to use the appropriated funds in a manner alleged to favor religion. *See, e.g.*, Pet. Br. 25 (asserting with no supporting citation that the funds at issue "were appropriated without attached conditions or programmatic directives for the President's discretionary use within the Executive Office of the President and federal agencies"). In light of the legislative record set forth above, Congress shares full responsibility for the Executive Branch's use of

the funds that Congress appropriated to support the Faith-Based Initiatives.

The "nexus" between the taxpayer's standing as a taxpayer and the exercise of Congress's taxing and spending power is not destroyed because Congress has chosen to fund the Faith-Based Initiatives through general appropriations rather than by separate statute. Congress plainly expected the Executive to use its lump-sum appropriations consistent with the Executive's budget requests. *See In re LTV Aerospace Corp.*, 55 Comp. Gen. 307, 321 (1975) ("'[T]he relationship with the Congress demands that the detailed justification[s] which are presented in support of budget requests be followed. To do otherwise would cause Congress to lose confidence in the requests made and probably result in reduced appropriations or line item appropriation bills.'" (*quoting* H.R. Rep. No. 93-662, at 16 (1973))). Indeed, as described in Part I.B., *supra*, Congress went so far as expressly to dedicate appropriations to certain Faith-Based Centers in Conference Reports of the Appropriations Committees. *See Garcia v. United States*, 469 U.S. 70, 76 (1984) ("[T]he authoritative source for finding the Legislature's intent lies in the Committee Reports on the bill, which represent the considered and collective understanding of those Congressmen involved in drafting and studying proposed legislation.") (quotations and citations omitted); *In re LTV Aerospace Corp.*, 55 Comp. Gen. at 318 (although Committee Reports do not impose binding restrictions, "[t]his is not to say that Congress does not expect that funds will be spent in accordance with budget estimates or in accordance with restrictions detailed in committee reports"). When the Executive and Legislative branches are working in tandem in this fashion to support a common goal, the theoretical discretion of the Executive administering the funds is no "circuit breaker" between the

taxpayer challenge and congressional taxing and spending action. Pet. Br. 31.[16]

Moreover, as the legislative record makes clear, the Faith-Based Initiatives bear far closer resemblance to the "program of disbursement of funds pursuant to Congress' taxing and spending powers" at issue in *Kendrick* than the independent, unilateral Executive Branch decisions that Petitioners portray as being at issue in this case. 487 U.S. at 619-20. The Faith-Based Initiatives are not analogous to an isolated Executive Branch decision to "host a summit of foreign leaders" or to give a particular speech. Pet. Br. 26. *Cf. Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 480 & n.17 (1982) (one-time decision by the Secretary of Health, Education, and Welfare to transfer a single parcel of land acquired thirty years prior was not an exercise of authority conferred by the taxing and spending power). The Faith-Based Initiatives are an extensive series of programs that were methodically and systematically created and implemented over many years and which involve millions of dollars in taxpayer funds. From the moment the Initiatives were created, the President presented them to Congress, and ever since that time Congress has played an instrumental role in their implementation.

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[16] We are not arguing that the Executive Branch lacks any discretion concerning the use of funds in a lump-sum appropriation. *See, e.g., Lincoln v. Vigil*, 508 U.S. 182, 192 (1993). "'[I]ndicia in committee reports and other legislative history as to how the funds should or are expected to be spent do not establish any legal requirements on' the agency." *Id.* (*quoting In re LTV Aerospace Corp.*, 55 Comp. Gen. at 319). However, the question is not whether the Executive was legally required to use the appropriations for the administration of the Faith-Based Initiatives. The question is whether congressional involvement is sufficient to establish a nexus between the taxpayer's status as a taxpayer and Congress's exercise of its authority under Article I, Section 8. *See Flast*, 392 U.S. at 102.

Because Congress intentionally funded the Faith-Based Initiatives, of which the challenged actions were a part, it does not matter that the Executive made the final decision regarding the precise allocation of the funds. Neither *Flast* nor *Kendrick* required that Congress detail the final destination of every appropriated penny for taxpayer standing to be found. To the contrary, *Flast* and *Kendrick* were also brought as suits against Executive Branch officials administering the programs.

In *Flast*, the taxpayers challenged the disbursement of funds under Title I and II of the Elementary and Secondary Education Act of 1965. 329 U.S. at 85. Title I of that Act provided for federal payments to state educational agencies, which then passed on the payments in the form of grants to local educational agencies which used the grants to fund their own plans and programs. *Id.* at 85-86. The Commissioner of Education was given broad discretion over those grants. *See id.* at 86 ("[T]he Commissioner of Education is given broad powers to supervise a State's participation in Title I programs and grants."). Nor did Title II of the Act, which established a program of grants for instructional materials, require disbursements to be made to *religious* schools. *See id.* at 86-87 (explaining that Title II of the Act calls for federal grants to provide instructional materials for use "in public and private elementary and secondary schools" (*quoting* 20 U.S.C. § 821)). In fact, in *Flast* the complaint alleged in the alternative that the funding to religious schools was not even authorized by the Act. *Id.* at 87. The *Flast* court nevertheless found that the "[taxpayers'] constitutional challenge is made to an exercise by Congress of its power under Art. I, § 8, to spend for the general welfare." *Id.* at 103.

Similarly, *Kendrick* involved a challenge to a federal grant program that the Court found to be facially compliant with the Establishment Clause. 487 U.S. at 593. In holding

that the statute did not on its face violate the Establishment Clause, the Court concluded that the statute reflected a "successful maintenance of a course of neutrality among religions, and between religion and nonreligion." *Id.* at 607 (quotations and citations omitted). It was thus clear that the Act did not mandate the Secretary of Health and Human Services to administer the Act in the manner which gave rise to the "as applied" challenge. *Id.* at 593. Nevertheless, this Court concluded that the claims raised by the taxpayers were not "any less a challenge to congressional taxing and spending power simply because the funding authorized by Congress has flowed through and been administered by the Secretary." *Id.* at 619.

Nor can the expenditures to fund the conferences at issue be reasonably characterized as merely "incidental" or "regulatory" in nature. *See id.*; *see also Flast*, 392 U.S. at 102. Although Petitioners attempt to reduce the multimillion dollar expenditure which funds the Faith-Based Centers to incidental "speeches and meetings," Pet. Br. 26, these conferences, workshops and other outreach efforts aimed at funneling federal funds to faith-based organizations cannot be separated from Congress's authorization of the Faith-Based Centers and their work.

For example, defendant Ryan Streeter, Director of the HUD Office of Faith-Based Initiatives, explained to a House subcommittee that:

> In 2003, HUD responded to this problem [of supposed barriers to inclusion of faith-based and community organizations] by appointing faith-based and community liaisons in each of its 81 regional and field offices. These liaisons spend significant amounts of time educating grassroots organizations about HUD, how it works, and how its funds and other resources can be accessed.

> We have not stopped there. Another significant barrier has been the lack of understanding among small organizations about what makes the grant application successful. *So in 2004, HUD completed 180 2-day free grant writing seminars for faith-based and community organizations across the Nation. More than 16,000 from more than 10,500 organizations participated in these sessions, which consisted of hands-on practical grant writing training delivered by professionals.*[17]

Such substantial and systematic expenditure of taxpayer funds to support the congressionally sanctioned activities of the Centers is, according to the allegations in the Complaint, which at this stage must be taken to be true, a "direct dollars-and-cents injury" to the taxpayers. *Doremus v. Bd. of Educ.*, 342 U.S. 429, 434 (1952); *cf. id.* (taxpayer challenge to the reading of five Bible verses involved no "measurable appropriation" of school district funds). Permitting taxpayer standing in this case will not therefore open the floodgates for taxpayer standing in connection with every "incidental expenditure of tax funds" in the conduct of the Executive's business as the hyperbolic warning by Petitioners and its *amici* would suggest.

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[17] *Revitalizing Communities: Are Faith-Based Organizations Getting the Federal Assistance They Need?: Hearing Before the Subcomm. on Federalism and the Census of the House Comm. on Gov't Reform*, 109th Cong. 7 (2005) (Statement of Ryan Streeter, Director, Office of Faith-Based Initiatives, U.S. Dep't of Housing and Urban Development) (emphasis added).

B. *Flast* and *Kendrick* Do Not Limit Standing Only to Those Instances When Funds Are Disbursed Outside of the Government

Nothing in *Flast* or *Kendrick* limits taxpayer standing to situations involving a direct grant of appropriated funds to nongovernmental parties. *Flast* explained that "one of the specific evils feared by those who drafted the Establishment Clause" was the danger that "the taxing and spending power would be used to favor one religion over another or to support religion in general." 392 U.S. at 103. Support to religion can take many forms other than monetary aid to third parties.

For example, as Judge Posner stated below, if the Petitioners' proposed limitation were adopted, a taxpayer would not have standing to challenge under the Establishment Clause an executive official's decision (or even a specific congressional appropriation) to "build a mosque and pay an Imam a salary to preach in it" because such action would not involve a grant to a third party. Pet. App. 11a-13a. *But see Everson v. Bd. of Educ.*, 330 U.S. 1, 15 (1947) ("The 'establishment of religion' clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church."). Likewise, if the Petitioners' reading of *Flast* were adopted, staff members of the Faith-Based Centers could use taxpayer funds to support a systematic campaign to travel across the country hosting worship services and proselytizing. The latter hypothetical is not too far removed from the allegations in this case. *See* Pet. App. 10a (opinion below stating that the complaint "portrays the conferences organized by the various Centers as propaganda vehicles for religion"); Amended Compl. ¶¶ 32, 37, 40. There is no principled basis on which to deny taxpayer standing to challenge such expenditures by the government but to allow standing when the money

ultimately flows into the coffers of a third party. The injury to the taxpayer in both circumstances — the use of taxpayer funds to support or favor religion — is identical.

Moreover, Petitioners' argument that standing is inappropriate in this case because "the statutory direction is for the Executive to do something other than disburse funds," Pet. Br. 29, is misplaced. The central purpose of the Faith-Based Initiatives is to facilitate the disbursement of grants to "faith-based and community organizations." In March 2006, the White House explained that more than $2.1 billion in grants had been awarded to religious organizations in Fiscal Year 2005 by seven federal agencies.[18] The conferences being challenged are an integral part of the congressionally sanctioned process of awarding grants, as they are intended to "provide participants with information about the government grants process and available funding opportunities" to "empower[] FBCOs [Faith-Based and Community Organizations] to compete more effectively for funds."[19]

In any event, the government's provision of training and information to religious groups to assist them in obtaining grants confers a benefit on the groups even if no money is paid out at the conferences themselves. Such preferential access to government funds is itself a valuable commodity. From the perspective of the taxpayer who must fund the conferences, it does not matter that such a benefit takes a form other than cash payments. There is simply no

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[18] White House, *Fact Sheet: Compassion in Action: Producing Real Results for Americans Most in Need* (Mar. 9, 2006), *available at* http://www.whitehouse.gov/news/releases/2006/03/20060309-3.html (last visited Jan. 29, 2007).

[19] White House Office of Faith-Based and Community Initiatives, *White House Faith-Based and Community Initiative*, *available at* http://www.whitehouse.gov/government/fbci/president-initiative.html (last visited Jan. 29, 2007).

basis to require that alleged aid to religion take the form of cash disbursements in order for a taxpayer to have standing.

C. Failure to Find Standing in This Case Would Allow Congress and the Executive to Collaborate to Circumvent the Establishment Clause

By declining to find standing for taxpayers in this case, the Court would create a loophole allowing the government to support religion and insulate its actions from judicial review. Congress and the Executive could collaborate to give preferential treatment to religious groups, but deny taxpayers standing to challenge such action by funding it through a general appropriation rather than by separate statute.

The collaboration between Congress and the Executive to fund the Faith-Based Initiatives shows exactly how such general appropriations can be used to obtain a shared objective of Congress and the Executive without an express statutory grant of authority. Each year the Executive requested funding for its Faith-Based Initiatives in budget documentation and Congress provided the requested funding. Congress was also able to provide specific direction as to the use of the funds without imposing a statutory requirement by stating in committee reports how it wishes the Executive to spend the money that the Executive Branch has requested. *See, e.g.*, H.R. Rep. No. 108-10, at 1425 (2003) (Conf. Rep.). Even though the Executive is not technically bound by Committee Reports, as a practical matter the understanding between the two Branches is that the appropriations will be allocated to specific uses.

For purposes of standing, there is no meaningful distinction between such an agreement as to use of funds provided as part of the general appropriations process and a

separate statutory mandate that specifically directs the use of the funds. Denying standing to challenge the Executive's use of funds appropriated through informal direction will only encourage use of such devices when Congress knows its objectives test the limits of the Establishment Clause. Failure to find taxpayer standing in this case would foreclose a critically important means of redress against such collaborative action by Congress and the Executive.

III. INSULATING THE EXECUTIVE'S USE OF CONGRESSIONALLY APPROPRIATED FUNDS FROM A TAXPAYER'S ESTABLISHMENT CLAUSE CHALLENGE WOULD BE INCONSISTENT WITH THE INTENT OF THE FRAMERS OF THE CONSTITUTION

Effectively, what Petitioners maintain is that Executive Branch action is immune from an Establishment Clause lawsuit brought by taxpayers because the Executive's expenditure of congressionally authorized funds is solely a matter for the Executive's discretion. The notion that somehow the Executive Branch would have the ability to direct public money to support religion on its own accord would have astonished the nation's Founders. The Founders would never have regarded the Executive Branch as having the power to undertake a broad program such as the Faith-Based Initiatives without congressional support.

To the contrary, the Founders understood that the Executive could not make significant expenditures absent congressional authorization, because Congress controlled the "purse," that is, the power to tax and spend.[20] This belief

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[20] *See* Remarks of George Nicholas, *in* 3 Jonathan Elliot, *The Debates in the Several State Conventions on the Adoption of the Federal*

was informed by their familiarity with English history, in particular, with the English Bill of Rights of 1689, which definitively resolved Parliament's authority over matters of taxation and expenditure. Among other things, the English Bill of Rights provided "That levying money for or to the use of the crown, by pretence of prerogative, without grant of parliament, for longer time, or in other manner than the same is or shall be granted, is illegal." 5 *The Founders' Constitution* 2 (Philip B. Kurland & Ralph Lerner eds., 1987). Indeed, both proponents and opponents of the Constitution demonstrated their familiarity with the English Bill of Rights and its declaration of legislative supremacy by referring to it frequently in the debates over the proposed Constitution.[21]

Constitution, at 17 (2d ed. 1836) [hereinafter "*Debates*"] ("Any branch of government that depends on the will of another for supplies of money, must be in a state of subordinate dependence . . ." and, consequently, the House of Representatives will be able to oppose and check the president's power); Remarks of Oliver Ellsworth, *in* 2 J. Elliot *Debates*, *supra*, at 195 (Congress will have the "power of the sword" and the "power of the purse"); Remarks of Gov. Randolph, *in* 3 J. Elliot *Debates*, *supra*, at 201 (in England, "the sword and the purse are in different hands," but in America, Congress gives the money and must be consulted on war; the Executive "can handle no part of the public money except what is given him by law."). *See also The Federalist No. 72*, at 435 (Alexander Hamilton) (Clinton Rossiter ed., 1961) ("If a British House of Commons, from the most feeble beginnings, *from the mere power of asserting or disagreeing to the imposition of a new tax*, have, by rapid strides, reduced the prerogatives of the crown . . . what would be to be feared from an elective magistrate of four years' duration with the confined authorities of a President of the United States?") (emphasis in original).

[21] *See, e.g.*, Remarks of George Nicholas, *in* 3 J. Elliot *Debates*, *supra* note 20, at 19 (1689 Declaration of Rights limited "the prerogative of the crown"); Remarks of Patrick Henry, *in* 3 J. Elliot *Debates*, *supra* note 20, at 316-17 (1689 Bill of Rights "put an end to all [tyranny], by defining the rights of the people, and limiting the king's prerogative").

Because the Founders assumed that Congress would have the power to control spending, when the First Congress adopted the Bill of Rights, they framed the prohibitions of the Establishment Clause as a restriction on Congress's power to pass laws. As this Court has emphasized on numerous occasions, the Founders were especially (although not exclusively) concerned with the possibility that the new federal government might tax the people to support a religious institution or institutions and, accordingly, they wanted to prohibit Congress from levying taxes "to support any religious activities or institutions." *Everson v. Bd. of Educ.*, 330 U.S. at 16. Of course, the entire Bill of Rights, including the Establishment Clause, was intended to bind the government as a whole. However, because the Founders understood that only Congress has the power to levy taxes and make appropriations, it would have been both superfluous and incongruous to phrase the Establishment Clause as "The Congress and the President shall make no law respecting an establishment of religion."

Yet, this is precisely the historically blind interpretation of the Establishment Clause and Article III that Petitioners urge this Court to adopt. In accepting Petitioners' argument, this Court would allow an alleged establishment of religion to go unchallenged under the pretense that the Executive's actions were not authorized by Congress. The Founders would not have accepted the notion that the Executive could implement a program of the scale at issue in this case without congressional sanction and funding. In forbidding the Congress from passing a law establishing religion, the Founders would have understood that Congress could not evade that restriction through the fiction that it was the Executive, and not Congress, directing the spending of taxpayer money.

But Petitioners' misreading of history goes even deeper. One of the cornerstones of Petitioners' argument is

the proposition that taxpayers cannot challenge the expenditures at issue because the expenditures are "for the government's internal operations." Pet. Br. 41. Petitioners forget that the Church of England, the religious establishment most familiar and repugnant to the Founders, was an "internal operation" of the state ever since the Supremacy Act of 1534. 1 W. Holdsworth, *A History of English Law*, at 597 (7th ed. 1966) (through the Tudor settlement, "[t]he church had been brought within the state; and subjected to the power of the crown.").

No reading of the Establishment Clause that does justice to history, and to the abuses of power the Founders intended to prevent, could possibly conceive that the Executive Branch could have unfettered authority to support religion, inside or outside the government, and to insulate such support from a judicial challenge by injured taxpayers. The Founders did not intend to install Henry VIII in the White House.

IV. IN THE ALTERNATIVE, THE WRIT OF CERTIORARI SHOULD BE DISMISSED BECAUSE THIS CASE DOES NOT RAISE THE QUESTION PRESENTED

The question presented by Petitioners is whether taxpayers have Article III standing to bring an Establishment Clause challenge "to the actions of Executive Branch officials pursuant to an Executive Order, where the conduct is financed only *indirectly* through general appropriations legislation." Pet. Br. I (emphasis added). This question was framed based on the erroneous assumption that Congress did not intentionally fund the Faith-Based Initiatives or the Faith-Based Centers supporting those Initiatives.

The court of appeals also erroneously concluded that the question presented was whether a taxpayer can have

Article III standing to challenge an alleged violation of the Establishment Clause "unless Congress has earmarked money for the program or activity that is challenged." Pet. App. 1a. The court of appeals presumably fashioned the question in such terms because the full legislative record was not developed below:

> There [was] no suggestion that these are appropriations earmarked for these conferences, or for any other activities of the various Faith-Based and Community Initiatives programs, or for a statute pursuant to which the programs were created.

Id. at 11a.

As demonstrated above, Congress *did* specifically intend that the activities of the Faith-Based and Community Initiatives programs be funded by its appropriations. Based on the legislative record, this case is governed squarely by *Flast* and *Bowen* and the Court should find standing under those precedents. In the alternative, because the question presented and the decision below were premised on an incomplete record, *Amici* respectfully suggest that the writ of certiorari be dismissed as improvidently granted. *See Belcher v. Stengel*, 429 U.S. 118, 119 (1976) (dismissing writ as improvidently granted once it became apparent that "the question framed in the petition for certiorari is not in fact presented by the record now before us").

CONCLUSION

For all the foregoing reasons, this Court should either affirm the conclusion of the court of appeals that standing in this case is consistent with this Court's holdings in *Flast* and

Bowen or, in the alternative, dismiss the writ of certiorari as improvidently granted.

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